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No. 03-381

IN THE

Supreme Court of the United States

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES

Petitioners,

v.

RONALD HANSEN, individually and in his official capacity as Police Chief,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

Petitioners in their questions presented have rephrased into three parts the actual central issue which was presented to the Fourth Circuit below, which is:

> whether when there are allegations that a discreet racial group has been subjected to discrimination, it is lawful to conduct interviews in the first instance only of members of that group to ascertain their experiences and perceptions with respect to the discrimination. (Appendix pp. 10-11)

Respondents take exception to Petitioners' attempts to recreate facts and assert knowledge to Defendant Ronald Hansen for which there was no record evidence below. In the underlying case, the Plaintiffs chose not to depose Defendant Ronald Hansen, and the only testimony regarding his basis for having ranking black officers interview other black officers on the force was Chief Hansen's testimony in one of the Plaintiffs' grievance hearings below:

> The issue of racial discrimination, racism has surfaced two or three times prior to these incidents, and I needed to know if, in fact, there was any discrimination or racism on our department. So, at that point, I determined that I wanted to have an inquiry to find out if, in fact, there was and if there was, of course, I needed to deal with it. (J.A. p. 92)

The Petitioners go to great lengths to preface every argument by implying that the Chief's motive for violation

of equal protection was a "witch hunt" for members of "Officers For Equality." Ironically, the Record below established that Plaintiff Reaves was not even a member of Officers For Equality.

Despite Petitioners' emphasis on Chief Hansen's "motives," his motivation played no role in the analysis of the legal issue before the Court, and Respondent submits that the Petitioners are simply attempting to pull Chief Hansen into the retaliatory termination claim which they are presently pursing against the City of Fayetteville in the trial court. Both the District Court and Fourth Circuit Court below agreed that the Plaintiffs' "claim that Chief Hansen violated the Equal Protection Rights by further targeting those African American officers who identified discriminatory practices within the department . . . does not state a cognizable equal protection claim." (A. p. 11, citing slip opinion).

Petitioners have failed to set forth a basis for granting a writ, as they have failed to articulate any real conflict between the Fourth Circuit's decision below, and any decision of another United States Court of Appeals or the Supreme Court. Their argument also fails to establish an important question that runs contrary to established constitutional logic.

THE FOURTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH EQUAL PROTECTION DECISIONS OF ANY OTHER U.S. COURT OF APPEALS OR THE SUPREME COURT.

Petitioners have contended that the Fourth Circuit's decision conflicts with the Supreme Court's decision in *Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 554 (1977), regarding equal protection, and that the lower court's decision further conflicts with the decisions of *Behrens v. Pelletier*, 516 U.S. 299, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996), and *Johnson v. Jones*, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995), which preclude an appellate court's resolution of disputed facts. The Petitioners, however, have failed to analogize any facts contained in *Arlington Heights*, or any other Court of Appeals or Supreme Court decision, which illustrate a factual/legal conflict with the Court's decision below. In fact, the Fourth Circuit in applying *Behrens v. Pelletier*, explained why the issue presented to the Court, was proper for summary judgment consideration, aside from arguments of the Police Chief's motive:

> The existence of a factual dispute regarding Hansen's motives does not preclude us from entertaining this appeal even though we cannot resolve disputes of fact. What we can and will do is answer the abstract question of law as to whether when there are allegations that a discrete racial group has been subjected to discrimination, it is lawful to conduct interviews in the first instance only of members of that group to ascertain their experiences and perceptions with respect to discrimination. See *Behrens v. Pelletier*, 516 U.S. 299, 312-313 (1966) (A. pp. 10, 11)

Petitioners characterized the decision below as a "landmark departure" from the evidentiary standards of proof that a plaintiff would be required to show to prove existence of discrimination under the equal protection clause as provided under *Arlington Heights v. Metro Housing Dev. Corp*, which position again ignores the fact that the Fourth Circuit was presented with a clear legal question that did not rely upon facts regarding motivation. The Fourth Circuit succinctly followed the equal protection analysis established by the Supreme Court to determine (1), whether the Plaintiffs have set forth a claim indicating that they have been deprived a constitutional right, and (2), whether the right which the Defendant allegedly violated was "clearly established at the time of its alleged violation so that a reasonable person would have known of the right." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982), (A. pp. 9-10)

The Fourth Circuit held that the first prong of the test was not met in that relative to the question of whether blacks were discriminated against, whites and blacks were not "similarly situated." (A. p. 13) The decision pointed out that the Plaintiffs could not show disparate treatment between black and white officers, as the inquiry was a response to allegations of discrimination only against black officers. (A. p. 14)

The Court then addressed the second prong of the equal protection analysis, which is whether the constitutional right in question was "clearly established" at the time alleged so that "a reasonable person would have known of the right." The Fourth Circuit, in finding that the Plaintiffs have failed to establish that Chief Hansen had violated the "objective legal reasonableness" standard of *Harlow v. Fitzgerald*,

457 U.S. 800, 102 S. Ct. 2727 (1982), pointed out what Respondent submits is an obvious truth:

> Certainly if judges of United States Courts of Appeals are of the view that plaintiffs are advancing a "right" that did not exist when allegedly infringed (and still does not exist), then the right could not have been clearly established at the time infringed. Indeed, it would be remarkable to hold that a reasonable person, here a Chief of Police, should have known more constitutional law than United States Circuit Judges and that because he did not, he should be subject to the imposition of monetary damages. (A. p. 20)

The Fourth Circuit also noted in its decision that Defendant Hansen in his appellate Brief had thrown down the "gauntlet" to the Plaintiffs in stating in his opening Brief that he had been unable to locate "any appellate cases similar to the trial court's basis for denying him qualified immunity . . . , and that the absence of any such cases was "an indicator that his proactive decision to interview black officers can certainly not be said to have violated 'clearly established law' as of February 1996." (A. p. 23)

The Court below also alternatively discussed the fact that even if the Plaintiffs' claim had not failed the initial prong, that Chief Hansen's decision to have ranking black officers interview black officers concerning perceived discrimination on the force would have survived "strict scrutiny" analysis. The Circuit Court pointed out that although the District Court in its slip opinion and the Petitioners have contended that there were narrow and more tailored methods to determine

if there were actual indications of discrimination on the force, that they have failed to suggest or give any examples of a method more narrowly tailored than that chosen by Chief Hansen. (A. pp. 15-20) What makes the Petitioners contention invalid on its face, is that to accept their equal protection analysis in our context would mean that an administrator, who was presented with complaints that female employees were being sexually harassed, would be unable to initially assign a female administrator to speak with the female employees to determine if the problem was widespread, or isolated. In fact, an administrator's failure to so address a claim of this nature may in and of itself subject him to liability. Respondent further submits that this decision also runs contrary to the normal investigative process which is to first talk with the individuals who are said to be the "victims" of wrongdoing, to first determine the specifics, and the scope of any offense.

Had there been recurring complaints of discrimination against Latinos, or anti-Semitic statements or treatment of Jewish officers, then Chief Hansen would have likewise had a rational basis for inquiring of these officers if they perceived the problem to be widespread.

CONCLUSION

Respondent submits that the Petition fails on its face to establish any conflict between the Fourth Circuit's immediate decision and any other Court of Appeals or Supreme Court case. The decision written by Judge Greenberg for the majority of the Court, clearly and succinctly addressed the facts at bar under the analysis provided by the Supreme Court.

For the reasons set forth above, Appellant Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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